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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 528

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., PETITIONERS,

vs.

NATIONAL BITUMINOUS COAL COMMISSION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 16, 1938.

CERTIORARI GRANTED DECEMBER 19, 1938.

SUPREME COURT OF THE UNITED STATES

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United States Court of Appeals for the District of Columbia

A. District Court of the United States for the District of Columbia

In Equity No. 68049

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., *Plaintiffs*,

vs.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, THOMAS S. HAYMOND, INDIVIDUALLY, &C., ET AL., *Defendants*.

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 Filed September 7, 1938

In the District Court of the United States for the District of Columbia.

IN EQUITY NO. 68049

UTAH FUEL COMPANY,
Judge Building, Salt Lake City, Utah.
INDEPENDENT COAL AND COKE COMPANY,
Walker Bank Building, Salt Lake City, Utah.
LIBERTY FUEL COMPANY,
Kearns Building, Salt Lake City, Utah.
ROYAL COAL COMPANY,
Newhouse Building, Salt Lake City, Utah.
SPRING CANYON COAL COMPANY,
Newhouse Building, Salt Lake City, Utah.
UNITED STATES FUEL COMPANY,
Newhouse Building, Salt Lake City, Utah
CHESTERFIELD COAL COMPANY,
Atlas Building, Salt Lake City, Utah.
HI-HEAT COAL COMPANY,
22 West Second Street, South, Salt Lake City, Utah.
SHERIDAN-WYOMING COAL COMPANY,
Monarch, Wyoming.
HOTCHKISS COAL COMPANY,
Monarch, Wyoming.
MALLORY COAL COMPANY,
Pritchard Building, Huntington, W. Va.
CARBON FUEL COMPANY,
Kanawha Valley Building, Charleston, W. Va.
DIXPORT COAL COMPANY,
Kanawha Valley Building, Charleston, W. Va.
THE HANNA COAL COMPANY OF OHIO,
Leader Building, Cleveland, Ohio.
PITTSBURGH COAL COMPANY,
Henry W. Oliver Building, Pittsburgh, Pa.
JAMISON COAL AND COKE COMPANY,
Jamison Building, Greensburg, Pa.
ATLANTIC SMOKELESS COAL COMPANY,
Asko, West Virginia.
WHEELING COAL COMPANY,
River Road, Wheeling, W. Va.
WESTMORELAND COAL COMPANY,
2500 Fidelity Trust Building, Philadelphia, Pa.
ROCHESTER AND PITTSBURGH COAL COMPANY,
655 Church Street, Indiana, Pa.
ASHLAND COAL & COKE COMPANY,
Bluefield, W. Va.
HILLMAN COAL & COKE COMPANY,
Grant Building, Pittburgh, Pa.
Plaintiffs,

v.

NATIONAL BITUMINOUS COAL COMMISSION, and
PERCY TETLOW,
ELRAS E. GREENLEE,
THOMAS S. HAYMOND,
JOHN C. LEWIS,
WALTER H. MALONEY,
CLARENCE E. SMITH,
Individually and as Members of the
National Bituminous Coal Commission, and
P. W. McCULLOUGH,
Individually and as Secretary of the
National Bituminous Coal Commission,
Defendants.

BILL OF COMPLAINT FOR INJUNCTION AND PETITION FOR DECLARATORY JUDGMENT.

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2 To the District Court of the United States
For the District of Columbia:

Plaintiffs bring this, their bill of complaint against the defendants herein named and respectfully complain and show to the Court as follows:

1. Plaintiff, Utah Fuel Company, is a corporation of the State of New York; plaintiffs, Independent Coal and Coke Company, Spring Canyon Coal Company, and Liberty Fuel Company, are corporations of the State of Utah; plaintiffs, United States Fuel Company and Hi-Heat Coal Company are corporations of the State of Nevada; and plaintiffs Royal Coal Company and Chesterfield Coal Company are corporations of the State of Delaware. Each of the plaintiffs described in this paragraph has its principal office and place of business in Salt Lake City, Utah, and each owns and operates mines located in the state of Utah from which is produced, sold and shipped bituminous coal to points in Utah and to points in various other states, in competition with bituminous coal mined and produced by other coal operators in the states of Utah, Wyoming, Colorado, Montana, Washington and other states. These plaintiffs, which will hereinafter sometimes be called the Utah plaintiffs, have coal mines and property in District No. 20, and in Minimum Price Area No. 7, as defined in the Bituminous Coal Act of 1937.

Plaintiffs, Sheridan-Wyoming Coal Company, Inc., and the Hotchkiss Coal Company, are corporations of the State of Wyoming, each of which owns and operates mines in the state of Wyoming from which is produced, sold and shipped

bituminous coal to points in Wyoming and to points in various other states in competition with bituminous coal mined and produced by other coal operators in the states of Wyoming, Utah, Colorado and other states. These plaintiffs, who will hereinafter sometimes be called
3 the Wyoming plaintiffs, have coal mines and property in District No. 19, and in Minimum Price Area No. 7, as defined in the Bituminous Coal Act of 1937.

Plaintiffs, Mallory Coal Company, Carbon Fuel Company, Dixport Coal Company, Atlantic Smokeless Coal Company, Wheeling Coal Company and Ashland Coal and Coke Company, are corporations of the State of West Virginia, which own and operate coal mines in the state of West Virginia located in Districts Nos. 6, 7, and 8, and in Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937, and each of which is engaged in the production, sale and shipment of bituminous coal to points in West Virginia and to points in various other states. Plaintiffs, Pittsburgh Coal Company, Jamison Coal and Coke Company, Westmoreland Coal Company, Hillman Coal and Coke Company, and Rochester & Pittsburgh Coal Company are corporations of the State of Pennsylvania which own and operate coal mines in the state of Pennsylvania located in Districts Nos. 1 and 2, and Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937. Plaintiff, The Hanna Coal Company of Ohio, is a corporation of Ohio, which owns and operates coal mines in the state of Ohio located in District No. 4 and Minimum Price Area No. 1, as defined in the Bituminous Coal Act of 1937. Each of the plaintiff corporations, which may hereinafter sometimes be called collectively the eastern plaintiffs, is engaged in the production, sale and shipment of bituminous coal in interstate and in intrastate commerce, from the mines and districts described in competition with bituminous coal mined by other coal producers in West Virginia, Pennsylvania, Kentucky, Ohio and other states.

2. Plaintiffs and each of them have duly and regularly accepted the Bituminous Coal Code, promulgated by the defendant, the National Bituminous Coal Commission, under the provisions of the Bituminous Coal Act of
4 1937, and are members of that code in good standing.

3. Plaintiffs bring this complaint against the defendants, National Bituminous Coal Commission, herein-

after sometimes called the Commission, and Percy Tetlow, Pleas E. Greenlee, Thomas S. Haymond, John C. Lewis, Walter H. Maloney, and Clarence E. Smith, as individuals and as members of that Commission, and against F. W. McCullough, as an individual and as secretary of that Commission. By the terms of the Bituminous Coal Act of 1937, the defendant Commission is established with its principal office in the city of Washington, D. C., for the purpose of carrying out the provisions of that act. Each of the individual defendants is a citizen of the United States and has his official residence and is to be found in the District of Columbia. The Commission is authorized to have a seal which shall be judicially recognized.

4. This is a suit in equity, of a civil nature, arising under the laws of the United States, and it presents and involves an actual controversy between plaintiffs and defendants, and the matter in controversy as to each plaintiff, exclusive of interest and costs, exceeds the sum of $3,000, and relates to an Act of Congress regulating interstate commerce, to wit: The Bituminous Coal Act of 1937. (15 U. S. C. 828-851).

5. Plaintiffs bring this suit to prevent irreparable injury and damage to them and to their business and property used by them in the production and sale of bituminous coal in interstate and intrastate commerce, and to prevent, and restrain the defendants and each of them and their agents and persons acting for them, from the threatened disclosure by the defendants of the cost data and realization prices which the plaintiffs and each of them have heretofore
5 filed with the Commission under the provisions of the Bituminous Coal Act of 1937, which provisions, as will hereinafter be shown, impose on the defendants the duty to treat in confidence and keep secure such cost data and realization prices as the private property of plaintiffs.

6. On March 30, 1938 the Commission made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of the total costs of the tonnage of coal from each minimum price area in the calendar year 1936, adjusted as provided by section 4(a), Part II of the Bituminous Coal Act of 1937, at which hearing the information obtained from individual coal producers with respect to individual costs of production of the coals of such

producers in the calendar year 1936, would be made available for introduction in evidence at such hearings to support the determination of the district boards of the total cost of the ascertainable tonnage produced in their respective districts in the calendar year 1936, and also to support the Commission's determination of the weighted average of the total cost of the tonnage for each minimum price area in that year, adjusted as prescribed in the Act. In such ruling the Commission further announced it construed section 10 (a) of the Bituminous Coal Act of 1937 as authorizing such a disclosure in such circumstances.

Thereafter certain of the plaintiffs herein filed a petition with the Commission which objected to the ruling of March 30, 1938 as erroneous and which prayed, *inter alia*, for a hearing and that upon consideration of the facts and circumstances recited in the petition and the provisions of the Bituminous Coal Act of 1937, the Commission vacate that ruling and rescind its construction of section 10 (a) of said act. The Commission thereupon assigned
6 that petition for hearing. Such a hearing was held at the office of the Commission in Washington, D. C., on May 25 and 26, 1938. The plaintiff, Mallory Coal Company, and certain other coal producers, participated in that hearing. As the result thereof, on June 1, 1938 the Commission filed its report, findings of fact and opinion, and made and entered an order as of that date. In that order the Commission adhered to its ruling of March 30, 1938, recited the substance of the petitions and the evidence of injury, whereupon it denied said petitions and ordered and directed:

"That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The plaintiff, Mallory Coal Company, and certain other coal producers, being dissatisfied and aggrieved by the order of the Commission of June 1, 1938, filed a petition in the United States Court of Appeals for the District of Columbia on June 6, 1938, pursuant to the provisions of sec-

tion 6 (b) of Part II of the Bituminous Coal Act of 1937. That petition was heard and considered by that Court and on August 1, 1938 in No. 7178, *Mallory Coal Co., et al.* v. *National Bituminous Coal Commission*, the Court dismissed the petition on the ground that the order entered by the Commission was not a reviewable order under the provisions of section 6 (b) of Part II of the Bituminous Coal Act.

7. On May 25, 1938 the Commission promulgated a notice and order for hearing in the redetermination of weighted average of the total cost of tonnage produced within minimum price areas Nos. 6, 7, 9 and 10. This proceeding known as General Docket No. 15, was assigned for hearing at the Shirley-Savoy Hotel, in Denver,
7 Col., on June 9, 1938. The order of the Commission of May 25, 1938 served notice that there would be made available for inspection by those interested persons who filed appearances at the hearing as therein provided, inter alia; "the verified cost reports of the individual producers within each of said districts upon which the cost data submitted to the District Boards by the Statistical Bureaus of the Commission are based, and upon which are based the said exhibits prepared by the Bureau of Research and Statistics of the Commission."

On or about May 31, 1938 the Utah plaintiffs and others filed a petition with the Commission requesting that it modify and set aside its ruling of March 30, 1938 and its order of May 25, 1938, hereinbefore described. Thereafter, to wit, on August 5, 1938 the Commission entered an order which denied that petition.

8. On August 31, 1938 the Commission made and entered an order in its General Docket No. 15 as to Minimum Price Areas Nos. 6, 7, 9 and 10, which provides:

"1. That the Secretary of the Commission be and he is hereby directed to cause the verified cost reports of the individual producers within each of Minimum Price Areas 6, 7, 9 and 10, submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 10th, 1938, at the offices of the Commission, Central Savings Bank Building, Denver, Colorado, by those interested parties who have filed appearances in this proceeding. Notices of

appearance may be filed with the Commission at the Secretary's Office, Washington, D. C., or at the Offices of the Commission, Central Savings Bank Building, Denver, Colorado.

2. The hearing in the matter of the determination of the weighted average of the total costs per net ton of the tonnage produced in Minimum Price Areas 6, 7, 9 and 10, is hereby reopened and notice is hereby given that the Commission will, on the 20th day of September, 1938, at 10:00 A. M. in its hearing room in the Albany Hotel, Denver, Colorado, afford all interested parties further opportunity to introduce affirmative evidence and to cross-examine witnesses as to the correctness of said composite reports heretofore introduced in evidence in this proceeding."

8 On the same day and in the same proceeding, the Commission also made and entered an order as to Minimum Price Areas Nos. 1, 2, 3, 4, and 5, which provides:

"1. That the Secretary of the Commission be and he is hereby directed to cause the varified cost reports of the individual producers within each of Minimum Price Areas 1, 2, 3, 4 and 5 submitted to the Commission pursuant to Orders Nos. 15 and 29, to be made available for inspection during business hours on and after September 15, 1938, at the offices of the Commission, Washington, D. C., by those interested parties who have filed appearances in this proceeding. Notices of appearance may be filed with the Commission at the Secretary's office, Washington, D. C."

9. Unless defendants are restrained and enjoined, as herein prayed, the individual verified cost reports of the Utah and Wyoming plaintiffs herein whose coal mines are located in Minimum Price Area No. 7 will be made available for inspection by interested parties at the office of the Commission in the Central Savings Bank Building, Denver, Colorado, on and after September 10, 1938, and such data may thereafter be introduced by such interested parties at the hearing in the proceeding which, by the order, is assigned at the Albany Hotel in Denver, September 20, 1938; and, the individual cost reports of the eastern plaintiffs herein whose coal mines are located in Minimum Price Areas No. 1 will be made available for inspection by interested parties at the offices of the Commission in Wash-

ington, D. C., on and after September 15, 1938. The disclosure of the individual cost reports and sales realization prices of plaintiffs, as threatened by the orders described, will cause plaintiffs and each of them irreparable injury and damage, and constitutes an unlawful procedure as well as a violation by defendants of the provisions of the Bituminous Coal Act of 1937.

9 10. Prior to the entry of the two orders hereinbefore described the Commission made and entered its order No. 15 on July 15, 1937. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it is required to be fully informed as to the production and distribution of bituminous coal, whereupon and pursuant to the authority conferred on it by section 10(a) of said act, it required each producer of bituminous coal, including plaintiffs to file with the Commission a complete report showing the detail costs of tonnage produced and the realization prices derived from the sale of coal; that such reports shall be made separately for each mine, and shall include all coal produced during the calendar year 1936, and all coal sold during the same period; that a copy of said order was sent by the Secretary of the Commission to each known coal producer within the United States, together with the Commission's cost forms Nos. 1 and 1-A. Each producer was required by the order to file, and plaintiffs did file, duly verified reports with the Statistical Bureau of the Commission in the districts within which the reporting mine or mines are located. Order No. 15 contained the following provision:

"The Commission directs special attention to the provisions of section 10 of said Act *relating to the confidential nature of the reports required under this order*, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

11. That cost forms Nos. 1 and 1-A, accompanying the Commission's order No. 15, described in the preceding paragraph and used by plaintiffs in submitting their detail production costs, selling costs and realization, bore at the top in bold type the assuring statement that:

10 "THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL."

That pursuant to the requirements of said order and relying on the confidence imposed by the provisions of section 10 (a) of the act under which authority order No. 15 was issued, as well as the requirement and condition of confidence specified in section 4 (a) Part II, plaintiffs prepared and filed with the Commission complete cost and realization reports for 1936 on forms 1 or 1-A for each of their mines, said reports having been filed with the Statistical Bureau for the respective districts.

12. Section 4 (a) Part II of the Bituminous Coal Act provides:

"All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. *All such records shall be held by the statistical bureau as the confidential* records of the code member filing such information."

The data thus reported is to be used by the Commission in the manner provided in sub-sections (a) and (b) as the basis of proposing and of establishing average minimum prices for the sale and distribution of bituminous coal. Section 10 (a) of the Bituminous Coal Act is as follows:

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court

and except that such information may be compiled in composite form in such manner as shall not be injurious
11 to the interests of any producer and, as so compiled, may be published by the Commission."

The data reported by the plaintiffs to the Commission supplies the detail on which "cost of production or sales realization", as referred to in section 10 (a), is based. The information supplied to the Commission by code members, such as plaintiffs, is, under the terms of section 4 (a) Part II, which affirmatively states:

"All such records shall be held by the statistical bureau as the confidential records of the code members filing such information."

13. While section 10 (a) states that "The Commission may require reports from *producers* * * *" it does not, in terms, authorize the Commission to require reports respecting cost of production, sales and distribution from code members.

The only part of the act which requires code members, such as plaintiffs, to furnish details as to the production, costs, sales, distribution, etc, is section 4 (a) Part II, which specifies that such reports, furnished the Commission in accordance with that section, shall remain "the confidential records of the code member filing such information". Plaintiffs believe and aver that it was not the intention of Congress by section 10 (a) of the act to do violence to the provisions of section 4 (a) Part II of the same act, and that the action contemplated by the Commission, based on its construction of section 10 (a), as reflected in its orders of August 31, 1938 hereinbefore described, does violence to that section as well as to section 4 (a) Part II and is therefore unlawful. Plaintiffs further aver that the cost data and realization prices of plaintiffs were submitted by them to the Commission under a condition of confidence, as provided by the Bituminous Coal Act of 1937, and that, in these circumstances, the Commission became then and there required by law and good conscience to preserve in
12 confidence and keep secure, the property rights of plaintiffs in their ownership of such cost data and realization prices, against the disclosure thereof to inter-

ested persons or others for the purpose of inspection, or for any other purpose, except with the consent of the plaintiffs and each of them.

14. Plaintiffs aver that they now regard and have always regarded knowledge of their cost of doing business and of their sales realization as their own valuable and private property, subject to be used and enjoyed by themselves alone. They have at all times zealously and successfully protected information of this character against disclosure to other persons who might thereupon either as consumers or as competitors, or potential competitors, of plaintiffs be able to convert such information to their own uses and advantage, and to the prejudice and disadvantage of plaintiffs. Plaintiffs further aver that their cost data and realization prices are their own valuable property, of which they may not be deprived without their consent; that in submitting such data to the Commission, pursuant to the provisions of the Bituminous Coal Act of 1937, plaintiffs did not give their consent to its disclosure by the Commission at a hearing, or to its disclosure for inspection by interested parties or by others in advance of, or incidental to a hearing.

15. Plaintiffs further aver that the immediate and proximate effect of the threatened disclosure by the defendants and their agents of the cost data and sales realization prices of plaintiffs, will be to make available such information and other private data of plaintiffs to their competitors and consumers of coal, which will cause plaintiffs irreparable injury and damage, in that it will destroy plaintiffs' property right in the information contained in such re-

13 ports, and will lay open such information to plaintiffs' competitors, and others, for such use, profit advantage and enjoyment as they may derive therefrom without limitation whatsoever; and that the use, profit and enjoyment which plaintiffs' competitors and consumers shall derive from such reports and information will naturally and inevitably result in great prejudice to plaintiffs and in irreparable injury to them in the conduct of their business as producers of coal. If said private information of plaintiffs is made available to the public for inspection, as defendants threaten to do, plaintiffs will suffer irreparable injury because *inter alia* customers, with the knowledge

of plaintiffs' costs thus acquired, would demand lower prices; that since certainty of continuous supply of coal is a factor in the purchase of coal, and since coal mines, which have a low cost of production are considered by customers to be most likely to supply coal continuously, the coal producer which has low costs of production would secure business which would otherwise go to the producer with a higher cost of production, and this would cause a loss or transfer of business from producer to producer, and from district to district; that low cost producers would be able to underbid high cost producers; that the credit standing of high cost producers would be impaired, thus making it difficult for them to borrow money; and that no protection would be afforded to plaintiffs even if the information as to their costs, be published without their names being shown, since competitors and others could readily identify the producer by a comparison of the tonnage on the cost sheets with that published by the Bureau of Mines and other organizations.

16. While, under the provisions of section 10 (a) of the Bituminous Coal Act the Commission is empowered to require reports from producers, and may require producers to maintain a uniform system of accounting of costs,
14 wages, operations, sales, etc., and while the producer, as such, is at liberty to disclose his cost of production and sales realization at any hearing before the Commission or in any court or elsewhere, plaintiffs aver that the interpretation of section 10 (a), on which the orders of the Commission of August 31, 1938 are based, is not only not authorized by the provisions of the Bituminous Coal Act of 1937, but is arbitrary unreasonable and in violation of the provisions of that act, and contrary to the spirit and plain intent thereof; that the Commission erred and was arbitrary in holding that the provisions of that act, which require that average minimum prices and marketing rules and regulations must be determined by the Commission after hearing, imposes on the Commission the necessity of either introducing in evidence or making available for inspection by interested parties the invidual cost data and realization prices submitted to the Commission by plaintiffs in confidence under the terms of section 4 (a) Part II, and, further, that the action of the Commission contem-

plated by its orders of August 31, 1938 hereinbefore described, which threaten to disclose the cost data of plaintiffs and each of them, for inspection by interested parties at the whim or discretion of the Commission or of the parties is arbitrary, unreasonable and unlawful.

Plaintiffs further aver that, as the Commission is authorized and required to determine only the weighted average of the total cost of the tonnage for each minimum price area, neither due process nor the statute itself requires that the cost data and other private information of plaintiffs, and each of them, or of coal producers as a class, and without their consent, may be made available for inspection by "interested parties", so that such data will be available for introduction in evidence or not, at the whim or discretion of the Commission or of the interested parties.

15 17. Plaintiffs aver that by reason of the unlawful administration of the Bituminous Coal Act of 1937 by the Commission, as shown by its avowed intention to disclose the cost data and other private information of plaintiffs for inspection by interested parties in certain proceedings before the Commission, plaintiffs are threatened with irreparable injury and will suffer irreparable injury and damage unless defendants are enjoined and restrained as herein prayed.

Plaintiffs have no plain adequate and complete remedy at law in the premises, and only in a suit of this character can the issues here presented be adequately determined and the proper relief had.

Wherefore, plaintiffs pray the Court that it take jurisdiction of this case and cause appropriate process to issue against the defendants and each of them, and require the defendants to answer this bill of complaint, as provided by the rules of this Court and by the law.

Plaintiffs further pray that defendants and each of them and their successors in office and all persons acting or claiming to act under their authority, or by their direction be restrained and enjoined both temporarily, pending the suit, and permanently, at the final hearing, from carrying out the provisions, purposes and acts contemplated by the orders of August 31, 1938 hereinbefore described, and that defendants and each of them be restrained and enjoined from making available for inspection to interested parties or

others, the individual verified cost reports of the Utah and Wyoming plaintiffs at the offices of the Commission in the Central Savings Bank Building in Denver, Col., on and after September 10, 1938, or at any other time or place, and of the individual verified cost reports of the eastern
16 plaintiffs, whose mines are located in Minimum Price Area No. 1 at the offices of the Commission at Washington, D. C., on and after September 15, 1938, or at any other time or place.

Plaintiffs further pray that pending final hearing herein, this Honorable Court forthwith cause to be issued a temporary restraining order and a preliminary injunction in accordance with the rules of this Court enjoining and restraining the defendants and each of them as hereinbefore prayed; that upon final hearing said injunction be made final and perpetual; that upon final hearing of this cause, this Court shall order, adjudge and decree, and also, pursuant to the provisions of the Federal Declaratory Judgment Act, as amended, shall order, adjudge and decree that the cost data and other private information of plaintiffs submitted by them to the Commission in confidence, is their own valuable and private property, which is entitled to the protection of the law, and that without the consent of plaintiffs the defendant Commission and the other defendants are without authority to make such private information available for inspection by parties interested in proceedings before the Commission either before, at, or after hearings of the Commission in such proceedings, and that plaintiffs shall have such other, further and general or special relief as the nature of the case may require and the Court may deem proper and just in the premises.

ROBERT E. QUIRK
Counsel for Plaintiffs.

17 District of Columbia: ss:

Robert E. Quirk, being duly sworn, deposes and says that he is attorney for the plaintiffs herein; that he has read the foregoing bill of complaint and is familiar with the facts and statements therein made, and that the same are true, except as to those stated on information and belief, and, as to those, he believes them to be true.

ROBERT E. QUIRK

Subscribed and sworn to before me this 6th day of September, 1938.

STUART H. ROBESON
Notary Public.

(Notarial Seal)

My Commission Expires: January 15, 1939

18 ***Motion to Dismiss***

Filed September 8, 1938

* * * * * *

To the District Court of the United States
for the District of Columbia:

Come now the defendants, and each of them, and respectfully move this Honorable Court to dismiss the petition filed herein for each of the following reasons:

1. Because this Honorable Court is without jurisdiction to grant the relief prayed for.

2. Because the petition does not state facts sufficient to constitute a cause of action against these defendants, or any of them.

3. Because the Order of the Commission complained of is but a procedural step in a matter wholly within the jurisdiction of the National Bituminous Coal Commission as conferred by the Bituminous Coal Act of 1937.

4. Because the allegations in the petition as to irreparable injury are but mere conclusions, and fail to state any facts as to whether or not plaintiffs, or any of them, have a high or low cost of production, which fact is essential to a showing of damage under the allegations that mines with a low cost of production are considered by customers to be most likely to supply coal continuously, and the coal
19 producer who has the low cost of production would secure business which would otherwise go to the producer with a higher cost of production.

5. Because the cost data which the Commission will make known to interested parties within the proceeding to establish minimum prices is not the current costs of the plaintiffs, or of any other producers, but is the costs incurred by such producers during the year 1936.

6. Because the Bituminous Coal Act of 1937 directs the National Bituminous Coal Commission to establish minimum prices based upon the weighted average cost of pro-

duction for the year 1936, adjusted so as to reflect changes in costs which have been established since January 1, 1936, which weighted average cost of production can be ascertained only by determining the actual costs of the individual producers, in the manner provided by the Act, and said Act further provides that all interested parties must be afforded an opportunity to be heard before any rule or regulation having the force and effect of law may be issued by the Commission, and no such opportunity would or could be afforded interested parties unless they were given full opportunity to examine the underlying data upon which the minimum prices will be predicated.

7. Because the alleged injury which the plaintiffs claim they will suffer if said 1936 costs are disclosed, if an injury at all, is not peculiar to them, but is common to all coal producers within the United States, whether code members or not.

8. Because if plaintiffs suffer any injury it is "damnum absque injuria" in that the Bituminous Coal Act was enacted for the protection of interstate commerce in bituminous coal, and under the scheme adopted by Congress it is necessary for the Commission in establishing the minimum prices, as directed by the Act, to show the basis for its administrative action in a record of a full and fair hearing, and this basis of its action cannot be shown unless the underlying cost figures, upon which minimum prices will be predicated, are disclosed in the proceedings, in order that interested parties, as well as a reviewing court, may be advised as to the evidentiary facts which resulted in the Commission's final determinations.

9. Because the petition on its face discloses that the Commission, after hearing, considered that the disclosure to interested parties of the said cost data was necessary in order that the Commission might proceed intelligently and fairly in establishing minimum prices as directed by the Act.

10. Because the cost data in question was submitted to the Commission pursuant to the provisions of Section 10 (a) of the Act, which Section provides that such data may be disclosed in evidence in any hearing before the Commission or any court, and because the Commission has found that such disclosure is necessary in the proceedings to establish minimum prices in order to afford interested parties a full

and fair hearing as provided by the Act and the Due Process Clause of the Constitution.

11. Because the cost data was submitted to the Commission by the plaintiffs, as well as by all other producers, with full knowledge of the provisions of Section 10 (a) of the Act, under which said cost data was collected by the Commission.

21 12. Because the petition failed to clearly show that the Commission, in disclosing said cost data in evidence, is not conforming to the statutes or is invading any constitutional rights, and because public policy forbids the use of injunction to hamper the Commission in the performance of its important and necessary duties unless it is clear beyond debate that it has failed or refused to conform to the statute or is invading a constitutional right.

Respectfully submitted,

National Bituminous Coal Commission, and
Percy Tetlow,
Pleas E. Greenlee,
Thomas S. Haymond,
John C. Lewis,
Walter H. Maloney,
Clarence E. Smith,
Individually and as Members of the National Bituminous Coal Commission, and
F. W. McCullough,
Individually and as Secretary of the National Bituminous Coal Commission,
Defendants.

By ROBERT W. KNOX
ROBERT L. STERN
THOS. J. O'BRIEN
Their Attorneys

22 *Order*

Filed September 9, 1938

* * *

This cause having come on to be heard on September 8, 1938 on plaintiffs' motion for a temporary injunction upon verified bill of complaint and on defendants' motion to dismiss the bill of complaint, and briefs having been submitted,

and counsel for the parties and for *amici curiae* having been heard orally, and it appearing to the court that the bill of complaint fails to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act of 1937, it is this 9th day of September, 1938:

Ordered, Adjudged, and Decreed that the motion for temporary injunction be denied, that the motion to dismiss the bill of complaint is granted, and that the bill of complaint filed herein be and the same hereby is dismissed.

JOSEPH W. COX
Justice.

Appeal noted from the above decree. Bond is hereby fixed in the sum of One Hundred Dollars ($100.00) or in lieu thereof a cash deposit of Fifty Dollars ($50.00) to be made with the clerk.

JOSEPH W. COX
Justice.

Memorandum

September 9, 1938

$50. deposited by Robt. E. Quirk for plaintiffs in lieu of bond on appeal.

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23 *Plaintiffs' Assignment of Errors*
Filed September 14, 1938.

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Now come the Utah Fuel Company, et al., plaintiffs in the above entitled cause and file the following assignment of errors on which they will rely on their prosecution of the appeal in the above entitled cause from the decree and judgment entered by this Honorable Court on the 9th day of September, 1938, and show in the proceeding, record and judgment in the above entitled cause there was manifest error in the following respects:

1. The Court erred in denying the prayers of the plaintiffs as made in their bill of complaint herein.

2. The Court erred in dismissing the bill of complaint filed herein.

3. The Court erred in granting defendants' motion to dismiss the bill of complaint.

4. The Court erred in refusing to issue a writ of injunction, as prayed for in the said bill of complaint, and in the motion made by plaintiffs for such a writ.

Wherefore said plaintiffs pray that said judgment and decree of the District Court of the United States for the District of Columbia may be reversed, and that said Court be directed to grant such other and further relief as may seem proper.

ROBERT E. QUIRK,
Counsel for Plaintiffs.

Service accepted:

ROBERT L STERN
Counsel for Defendants.

Sept 14, 1938

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24 *Designation of Record*
Filed September 14, 1938.

* * *

Now come the Utah Fuel Company, et al., plaintiffs in the above entitled cause, and the National Bituminous Coal Commission, et al., defendants in the above entitled cause, and designate the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal, namely:

1. Plaintiffs' verified bill of complaint.
2. Defendants' motion to dismiss.
3. Decree of the Court of September 9, 1938, which denied plaintiffs' motion for a temporary injunction, which granted defendants' motion to dismiss the bill of complaint, and which ordered, adjudged and decreed that the bill of complaint be dismissed.
4. Note of appeal in open court and action of the Court fixing appeal bond authorizing deposit in lieu thereof, and docket entry showing such deposit, as noted on the face of the decree of the Court.
5. Plaintiffs' assignment of errors.
6. This designation.

ROBERT E. QUIRK,
Counsel for Plaintiffs.
ROBERT L STERN
Counsel for Defendants.

25 District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 68049 in Equity, wherein Utah Fuel Company, et al., are Plaintiffs and National Bituminous Coal Commission, et al., are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of September, 1938.

C. E. STEWART,
(Seal) Clerk.

Endorsed on cover: No. 7247. Utah Fuel Co. et al., Appellants, vs. National Bituminous Coal Commission, et al. United States Court of Appeals for the District of Columbia. Filed Sep 16 1938. Joseph W. Stewart, Clerk.

[fol. 22] Monday, October 3rd, A. D. 1938.

No. 7247

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

The argument in the above entitled cause was commenced by Mr. J. V. Norman, attorney for appellants, continued by Mr. Robert L. Stern, attorney for appellees, and Mr. Allen Coe as amicus curiae for Consumers Counsel, and concluded by Mr. J. V. Norman, attorney for appellants.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7247

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Appeal from the District Court of the United States for the District of Columbia

Decided December 5, 1938

Robert E. Quirk, of Washington, D. C., and J. V. Norman, of Louisville, Kentucky, for appellants.

Robert W. Knox, General Counsel, and Thomas J. O'Brien, Attorney, National Bituminous Coal Commission, and Robert L. Stern, Special Assistant to the Attorney General, all of Washington, D. C., for appellees.

By leave of Court, Allen Coe and Orville H. Walburn, both of Washington, D. C., filed a brief on behalf of Consumers' Counsel of the National Bituminous Coal Commission as amicus curiae.

By leave of Court, Clarence A. Miller, of Washington, D. C., filed a brief on behalf of Aberdeen and Rockfish Railroad Company, et al. as amici curiae.

Before Groner, Chief Justice, and Miller and Vinson, Associate Justices

MILLER, Associate Justice:

Appellants prepared and filed with appellee, National Bituminous Coal Commission, cost data and sales realization reports on forms supplied by the Commission pursuant to the provisions of the Bituminous Coal Act of 1937.[1] Thereafter the Commission ordered its secretary to make such reports available for inspection by interested persons in advance of hearings at Denver, Colorado, and Washington, D. C. In their bill, filed in the lower court, appellants alleged inter alia that the reports were filed by them as members in good standing of the Bituminous Coal Code; that the Act imposes upon appellees the duty to treat the data contained in the reports in confidence as the private property of appellants; that the threatened disclosure of such data will cause irreparable injury and damage to their business and property; and prayed (1) that appellees be restrained from carrying out the orders for such disclosure; (2) that the court should order, adjudge and decree, pursuant to the provisions of the Federal Declaratory Judg- [fol. 24] ment Act (Jud. Code § 274d, U. S. C. A. § 400 (Supp. 1938)), that, except with the consent of appellants, appellees are without authority to make available for inspection the data and information submitted by appellants to the Commission. This appeal is from the decree of the lower court denying an injunction and dismissing the bill of complaint.

In Mallory Coal Company v. National Bituminous Coal Commisssion, (No. 7178, decided August 1, 1938)—— F. (2d) ——, —— App. D. C. ——, this court held that an order of the Commission, identical in purpose and effect with the one complained of in appellants' bill, was preliminary and procedural in character, and hence not subject to judicial review. It is apparent, therefore, that appellants are, in the present case, attempting to achieve indirectly[2] a result

[1] 50 Stat. 88, 15 U. S. C. A. § 840 (Supp. 1938).

[2] See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51.

which was denied in the Mallory case, i. e., judicial review of a preliminary and procedural order of an administrative agency.

It is a well established rule that available administrative remedies must be exhausted before judicial review can properly be given,[3] and that, except as hereinafter noted, preliminary procedural orders of administrative agencies are not subject to judicial review.[4]

The jurisdictional question whether the order complained of is reviewable is basic and cannot be waived by the parties.[5] One of the important reasons for requiring exhaustion of administrative remedies is to prevent the transfer to courts of duties imposed by law upon administrative agencies. Waivers of such questions in order to secure judicial review cannot give jurisdiction on appeal. "Primary single-

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[3] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 172; Porter v. Investors Syndicate, 286 U. S. 461, 468; United States v. Illinois Central R. R., 291 U. S. 457, 463; First Nat. Bank v. Board of County Commissioners, 264 U. S. 450, 455; Gorham Mfg. Co. v. State Tax Comm., 266 U. S. 265, 269-270; Red River Broadcasting Co., Inc., v. Federal Communications Comm., 98 F. (2d) 282, 284, —— App. D. C. ——, cert. denied, —— U. S. ——. Cf. Natural Gas Pipeline Co. v. Slattery, 302 U. S. 300, 311; United States v. Abilene & Southern Ry., 265 U. S. 274, 282; Delaware and Hudson Co. v. United States, 266 U. S. 438, 449.

[4] Federal Power Comm. v. Metropolitan Edison Co., supra note 3; United States v. Illinois Central R. R., 244 U. S. 82. See also, Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, 619, cer. denied, 297 U. S. 705, wherein such orders were likened to interlocutory orders of a court.

[5] United States v. Griffin, 303 U. S. 226, 229; Houston Natural Gas Corp. v. Securities and Exchange Comm., 4 Cir., (No. 4389, decided November 10, 1938), —— F. (2d) ——. See also, Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 174; Piedmont & Northern Ry. v. United States, 280 U. S. 469, 478; Reid v. United States, 211 U. S. 529, 539; Southland Industries, Inc. v. Federal Communications Comm., 99 F. (2d) 117, —— App. D. C. ——; Woodmen of the World Life Ins. Assn. v. Federal Communications Comm., 99 F. (2d) 122, —— App. D. C. ——

ness of action and unity" are imperative, and this would b destroyed by substituting the court for the Commission or b creating a divided authority in the determination of such questions.[6]

[fol. 25] It is also a well established rule that orders o federal administrative agencies may be reviewed only in the courts and pursuant to the procedures specified by Congress in the pertinent statutes.[7] It is apparent from the language of the Bituminous Coal Act that Congress intended all interested persons, who desired to do so, to seek relief pursuant to the administrative procedure therein provided;[8] that it intended judicial review of the Commission's orders to be given exclusively by the United States circuit courts of appeals or by the United States Court of Appeals for the District of Columbia.[9]

In some instances Congress has provided for judicial review of administrative action by use of the writ of injunction, as in the case of the Interstate Commerce Com-

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[6] See Procter & Gamble Co. v. United States, 225 U. S. 282, 298-299; Standard Oil Co. v. United States, 283 U. S. 235, 241; Lehigh Valley R. R. v. United States, 243 U. S. 412; Manufacturers Ry. v. United States, 246 U. S. 457, 483; Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, cert. denied, 297 U. S. 705.

[7] Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441, cited with approval in Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385; American Sumatra Tobacco Corp. v. Securities and Exchange Comm., 93 F. (2d) 236, 241, 68 App. D. C. 77, 82; Sykes v. Jenny Wren Co., 78 F. (2d) 729, 64 App. D. C. 379, cert. denied, 296 U. S. 624; Monocacy Broadcasting Co. v. Prall, 90 F. (2d) 421, —— App. D. C. ——; Jones v. Securities and Exchange Comm., 2 Cir., 79 F. (2d) 617, 619, cert. denied, 297 U. S. 705; Black River Valley Broadcasts, Inc. v. McNinch, (No. 7170, decided November 21, 1938) —— F. (2d) ——, —— App. D. C. ——. Cf. Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160.

[8] Sections 6(a), 12, 15, 50 Stat. 72, 85, 88, 90, 15 U. S. C. A. §§ 836(a), 842, 845 (Supp. 1938). See Mallory Coal Co. v. National Bituminous Coal Comm., (No. 7178, decided August 1, 1938) —— F. (2d) ——, —— App. D. C. ——.

[9] Section 6(b), 50 Stat. 72, 85, 15 U. S. C. A. § 836(b) (Supp. 1938).

mission.[10] In others it has provided for alternative review by appeal or by writ of injunction as in the case of the Radio Act of 1927.[11] In other instances, as in the Bituminous Coal Act, Congress has made no express provision for injunctive relief. It is twice provided in the Act that the United States Court of Appeals for the District of Columbia and the United States circuits courts of appeals shall have exclusive jurisdiction to enforce, set aside or modify orders of the Commission.[12]

For a number of reasons injunctive relief is not a proper remedy in the present case. If it should appear that in a particular statute no adequate provision had been made for judicial relief, the writ of injunction might perhaps be the only proper available remedy.[13] But the rule is otherwise [fol. 26] when adequate provision has been made for judicial

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[10] Urgency Deficiences Act of October 22, 1913, 38 Stat. 208, 219, 220, 28 U. S. C. A. §§ 41 (28), 46, 47. See Skinner & Eddy Corp. v. United States, 249 U. S. 557, 563.

[11] 44 Stat. 1169 (But note such alternative review was limited to orders revoking station licenses.). Cf. Communications Commission Act of 1934 48 Stat. 1093, 1099, 47 U. S. C. A. §§ 402(b) (2), 414 (Supp. 1938). But see Monocacy Broadcasting Co. v. Prall, 90 F. (2d) 421, —— App. D. C. ——, and Sykes v. Jenny Wren Co., 78 F. (2d) 729, 64 App. D. C. 378, cert. denied, 296 U. S. 624. See also, Black River Valley Broadcasts, Inc. v. McNinch, (No. 7170, decided November 21, 1938) —— F. (2d) ——, —— App. D. C. ——.

[12] Section 6(b), (d), 50 Stat. 72, 85, 86, 15 U. S. C. A. § 836(b), (d) (Supp. 1938).

[13] See Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50; Anniston Mfg. Co. v. Davis, 301 U. S. 337, 343 et seq.; Kansas City So. Ry. v. May, 8 Cir., 2 F. (2d) 680, 687. See also, United States v. Los Angeles & Salt Lake R.R., 273 U. S. 299, 312; United States v. Griffin, 303 U. S. 226, 238; Federal Trade Comm. v. Millers' Nat. Federation, 23 F. (2d) 968, 57 App. D. C. 360, cert. denied, 274 U. S. 743; South Porto Rico Sugar Co. v. Munoz, 1 Cir., 28 F. (2d) 820. Cf. Appalachian Elec. Power Co. v. Smith, 4 Cir., 67 F. (2d) 451, cert. denied, 291 U. S. 674; Carolina Aluminum Co. v. Federal Power Comm., 4 Cir., 7 F. (2d) 435.

review,[14] and in this respect the provisions of the Bituminous Coal Act are clearly adequate. The language of the Act is almost word for word identical in this respect with the review provision of the Securities and Exchange Act,[15] and of the Federal Power Act.[16] It also resembles closely the review provision of the National Labor Relations Act;[17] of which the Supreme Court has said:

> Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court.[18]

Equally inclusive review will be available from a final order of the National Bituminous Coal Commission and will provide full opportunity for challenging and testing its procedural order here involved.

Again, even where Congress has expressly provided for review by means of writ of injunction—as in the case of the Interstate Commerce Commission[19]—relief has been denied where the order sought to be enjoined was, as in the present case, a mere step in procedure;[20] and even

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[14] See cases cited in preceding note, and see also, Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——; Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160, 174; Federal Trade Comm. v. Maynard Coal Co., 22 F. (2d) 873, 57 App. D. C. 297.

[15] 48 Stat. 901, 15 U. S. C. A. § 78y(a) (Supp. 1938). See Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441.

[16] 49 Stat. 860, 16 U. S. C. A. § 825l(b) (Supp. 1938). See Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375; Newport Elec. Corp. v. Federal Power Comm., 2 Cir., 97 F. (2d) 580.

[17] 49 Stat. 449, 455, 29 U. S. C. A. § 160(f) (Supp. 1938).

[18] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 47; Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 49. See also, Anniston Mfg. Co. v. Davis, 301 U. S. 337, 345-346.

[19] 38 Stat. 208, 219, 220, 28 U. S. C. A. §§ 41(28), 46, 47, supra note 10.

[20] United States v. Illinois Central R. R., 244 U. S. 82; New York, O. & W. Ry. v. United States, S. D. N. Y., 14 F. (2d) 850, aff'd., 273 U. S. 652. See Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 384–385.

though in some cases no other review may be available.[21] [fol. 27] Moreover, even in a suit properly brought, in a case of which an equity court has jurisdiction, injunctive relief cannot be given, where the action sought to be enjoined involves a judgment based upon an exercise of discretion by an administrative agency in a matter properly within its jurisdiction.[22] The issuance of an injunction in

[21] See Piedmont & Northern Ry. v. United States, 280 U. S. 469, 477; Great Northern Ry. v. United States, 277 U. S. 172, 182. See also, United States ex rel. Chicago Great Western R. R. v. Interstate Commerce Comm., 294 U. S. 50, 62; United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 98 F. (2d) 268, 68 App. D. C. 396, cert. denied, —— U.S., ——; Newport Elec. Corp. v. Federal Power Comm., 2 Cir., 97 F. (2d) 580; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325. Cf. Shields v. Utah Idaho Central R. R., (No. 28, decided this day) —— U. S. ——.

Orders of the Interstate Commerce Commission may be subjected to statutory injunction only when they are final in the sense that they dispose of controversies, as distinguished from being merely a part of the preliminary stage of the proceedings in a controversy. United States v. Illinois Central R. R., 244 U. S. 82, 88, 89. Consequently, an order merely declaratory of the rights of the parties without granting or denying relief and without compelling or restraining action is not subject to attack. Piedmont & Northern Ry. v. United States, supra. Cf. Procter & Gamble Co. v. United States, 225 U. S. 282; Hooker v. Knapp, 225 U. S. 302; The Chicago Junction Case, 264 U. S. 258, 264. The same is true of orders merely tentative which do not determine the rights of parties. United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299, 308–309, 314; Delaware and Hudson Co. v. United States, 266 U. S. 438, 449. See United States v. Atlanta, Birmingham & Coast R. R., 282 U. S. 522, 527–528. See generally, Tollefson, Judicial Review of the Decisions of the Interstate Commerce Commission, 5 Geo. Wash. L. Rev. 503, 535 et seq.

[22] See Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, —— U. S. ——, and authorities there cited. See also, United States ex rel. Kansas City So. Ry. v. Interstate Commerce Comm., 98 F. (2d) 268, 68 App. D. C. 396, cert. denied, —— U. S. ——, and authorities there cited.

the present case would require a determination that the Commission's order was plainly and palpably erroneous and violative of a ministerial duty imposed by law beyond peradventure clear. Although it may be argued that such a duty appears to have been imposed by Section 4(a) of the Act, requiring that the cost data and sales realization reports solicited by the Commission be kept secret, it may be just as persuasively argued that the provisions of Section 10(a) permit the introduction of such material into evidence at any hearing before the Commission. The question may be properly reviewed and determined when it comes to us on appeal from a final order, but it is not before us at this time. The statute being ambiguous, and the construction placed thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event.[23]

Appellants' bill in the lower court also sought relief under the provisions of the Federal Declaratory Judgment Act. Jud. Code § 274d, 28 U. S. C. A. § 400 (Supp. 1938). But the procedure of that Act is not available to appellants. As was said by Sibley, J., in Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 559: "The new power to make a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin." The statute does not add to the jurisdiction of the federal courts, or create any new substantive right.[24] It is a procedural statute, which adds a remedy for use in cases of which federal courts already have jurisdiction.[25] The Fed-

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[23] United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324; Louisiana v. McAdoo, 234 U. S. 627, 633; New Orleans v. Paine, 147 U. S. 261; Wilbur v. United States ex rel. Kadrie, 281 U. S. 206, 218–219; United States ex rel. Chicago Great Western R. R. v. Interstate Commerce Comm., 294 U. S. 50, 61; Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, —— U. S. ——, and authorities there cited.

[24] Ohio Casualty Ins. Co. v. Marr, 10 Cir., 98 F. (2d) 973, 975; Board of Commissioners v. Cockrell, 5 Cir., 91 F. (2d) 412, cert. denied, 302 U. S. 740.

[25] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240; Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. (2d)

eral Declaratory Judgment Act "does not enlarge the scope of equity jurisdiction to permit its application to controversies which have not yet reached the judicial stage." [26] [fol. 28] The controversy must be one which is appropriate for judicial determination.[27] It is necessary, in order to insure the effectiveness of administrative procedures, that interested and aggrieved persons be required to exhaust administrative remedies before seeking judicial review or judicial interference.[28]

To permit judicial review, either by injunction or by declaratory judgment, of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings[29] and would render orderly administrative procedure impos-

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321; Putnam v. Ickes, 78 F. (2d) 223, 64 App. D. C. 339, cert. denied, 296 U. S. 612; Southern Pac. Co. v. McAdoo, 9 Cir., 82 F. (2d) 121, 122; Gully v. Interstate Natural Gas Co., 5 Cir., 82 F. (2d) 145, 149; Borchard, The Federal Declaratory Judgments Act, 21 Va. L. Rev. 35, 39.

[26] Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 599. See also, Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325; United States v. West Virginia, 295 U. S. 463, 475; Putnam v. Ickes, 78 F. (2d) 223, 226, 64 App. D. C. 339, 342, cert. denied, 296 U. S. 612.

[27] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240; Stephenson v. Equitable Life Assur. Soc., 4 Cir., 92 F. (2d) 406, 409. See Securities and Exchange Comm. v. Andrews, 2 Cir., 88 F. (2d) 441, cited with approval in Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385.

[28] See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51, and cases there cited. See also, Adams v. Nagle, 303 U. S. 532, 543: "It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible."

[29] Cf. Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 383–384.

sible.[30] Moreover, it would result in bringing to the courts such an avalanche of trival procedural questions as largely to monopolize their time and energies.[31] That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances.[32] Injury may result also from judicial determinations[33] and from direct legislative action. " * * * the expense and annoyance of litigation is 'part of the social burden of living under government.' "[34] Presumably Congress balanced the various considerations of private convenience and public policy when it enacted the Bituminous Coal Act.

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[30] See Adams v. Nagle, 303 U. S. 532, 543. Cf. United States v. Griffin, 303 U. S. 226, 236–237.

[31] See Federal Trade Comm. v. Claire Furnace Co., 274 U. S. 160.

[32] Federal Power Comm. v. Metropolitan Edison Co., 304 U. S. 375, 385: "So attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41. See also, Securities & Exchange Comm'n v. Andrews, 88 F. (2d) 441." See United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299, 314.

[33] See Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51–52.

[34] Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209, 222; Bradley Lumber Co. v. National Labor Relations Board, 5 Cir., 84 F. (2d) 97, 100, cert. denied, 299 U. S. 559.

In Heller Bros. Co. v. Lind, 86 F. (2d) 862, 864, 66 App. D. C. 306, 308, cert. denied, 300 U. S. 672, we said, citing Bradley Lumber Co. v. National Labor Relations Board, supra: "And, if the act should subsequently be held to be unconstitutional in a proper case, these losses will have to be borne without redress. But—as was said by Judge Sibley in a similar case in the Fifth Circuit—these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage as to which equity will interfere to prevent."

The lower court was without jurisdiction and the motion to dismiss was properly granted. Consequently, it is unnecessary for us to consider appellants' other contentions.

Affirmed.

[fol. 29] Monday, December 5th, A. D. 1938.

No. 7247, October Term, 1938

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants,

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Appeal from the District Court of the United States for the District of Columbia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Miller.

December 5, 1938.

[fol. 30] Saturday, December 10th, A. D. 1938.

No. 7247, October Term, 1938

UTAH FUEL COMPANY, INDEPENDENT COAL AND COKE COMPANY, LIBERTY FUEL COMPANY, et al., Appellants,

vs.

NATIONAL BITUMINOUS COAL COMMISSION and PERCY TETLOW, PLEAS E. GREENLEE, et al.

Order

On consideration of the following motions and petitions filed herein:

Appellees' motion for interpretation or dissolution of injunction pending appeal, filed December 8, 1938; Appellants'

motion to continue in effect injunction heretofore granted pending disposition of petition for rehearing and for stay pending application for certiorari in event petition for rehearing be overruled and for stay pending final disposition in event certiorari be granted, filed December 9, 1938; Appellants' petition for rehearing and application for stay for 15 days in order to permit appellants to apply to Supreme Court for certiorari and stay order, filed December 9, 1938;

It is ordered by the Court that the petition for rehearing be, and it is hereby, denied,

It is further ordered by the Court that the mandate of this Court herein be, and it is hereby, stayed until the 10th day of January, 1939, and that, in order to maintain the status quo pending the application for certiorari, the injunction heretofore issued by this Court is hereby continued in force and effect pending action by the Supreme Court, conditioned, however, upon the filing in the Supreme Court by appellants of a petition for certiorari and stay order within 10 days from the date of this order.

Dated December 10, 1938.

Per Curiam:

[fol. 31] In the United States Court of Appeals for the District of Columbia, October Term, 1938

No. 7247

United States Court of Appeals for the District of Columbia.
Filed Dec. 14, 1938. Joseph W. Stewart, Clerk.

Utah Fuel Company, et al., Appellants,

vs.

National Bituminous Coal Commission, et al., Appellees

Designation of Record

Now come the Utah Fuel Company, et al., appellants in the above entitled cause, and, for use in a petition for a writ of certiorari which appellants will file in the Supreme Court of the United States, designate the parts of the record which they desire to have included in the transcript, said parts

being considered sufficient for the determination of the questions to be raised on certiorari, namely:

1. Printed record in the Court of Appeals;
2. Minute showing argument;
3. Opinion of the Court of December 5, 1938;
4. Judgment of the Court of December 5, 1938;
5. Order of the Court denying appellants' petition for rehearing of December 10, 1938;
6. Order of the Court of December 10, 1938 granting injunction;
7. Clerk's certificate;
8. Together with a copy of this designation.

J. V. Norman, Robert E. Quirk, Counsel for Appellants.

Service of above designation accepted this 13th day of December, 1938.

Robert L. Stern, Special Assistant to the Attorney General. Robert W. Knox, General Counsel, National Bituminous Coal Commission.

[fol. 32] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 31, inclusive, constitute true copies of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for Appellants in the case of: Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Appellants, vs. National Bituminous Coal Commission and Percy Tetlow, Pleas E. Greenlee, et al. No. 7247, October Term, 1938, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this Fifteenth day of December —, A. D. 1938.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 19, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted, and the case is assigned for argument on Tuesday, January 3, 1939, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.